

July 2015

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## Recommended Citation

Arnold, M. Thomas (1982) "Incorporation of Professionals in Ohio: Past, Present, and Future," *Akron Law Review*: Vol. 15 : Iss. 2 , Article 1.

Available at: <https://ideaexchange.uakron.edu/akronlawreview/vol15/iss2/1>

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Arnold: Incorporations of Professionals in Ohio

# INCORPORATION OF PROFESSIONALS IN OHIO: PAST, PRESENT, AND FUTURE

by

M. THOMAS ARNOLD\*

## INTRODUCTION

**I**N 1961 the Ohio General Assembly enacted Chapter 1785 of the Ohio Revised Code authorizing the creation of professional associations. This legislation was deficient when enacted. Yet, despite criticism of the act and adequate opportunity,<sup>1</sup> the Ohio Legislature has failed to reform this chapter of the Revised Code. This article will look at some of the background out of which the Ohio professional association legislation arose and at the substance and deficiencies of that legislation. Comments will be made on how the proposed Ohio Professional Corporation Act, promulgated in 1979 by the Corporation Law Committee of the Ohio Bar Association, would change or clarify current law.<sup>2</sup>

## I. BACKGROUND

At common law a corporation was not permitted to practice a profession, a prohibition reflected in the Ohio general corporation law which states "[a] corporation may be formed for a purpose or purposes, other than for carrying on the practice of any profession. . . ."<sup>3</sup>

The common law rule, as codified in the Ohio general corporation law, prevented Ohio professionals, such as doctors and lawyers, from obtaining the corporate and tax benefits of incorporation. In an effort to gain these benefits, some Ohio professionals turned to an unusual form of business organization called the "limited partnership association."<sup>4</sup> This

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<sup>1</sup> See conclusion *infra*.

<sup>2</sup> Proposed Ohio Corporation Act, [hereinafter Proposed Act], reprinted in, *Report of the Corporation Law Committee*, 52 OHIO ST. B.A.R. 1767, 1770-80 (1979). This Proposed Act is based on the Model Professional Corporation Act [hereinafter M.P.C.A.], promulgated by the Committee on Corporate Laws of the American Bar Association. See Committee on Corporate Laws, *Report, Professional Corporation Supplement to the Model Business Corporation Act*, [hereinafter Report], 32 BUS. LAW. 289 (1976).

<sup>3</sup> OHIO REV. CODE ANN. §§ 1701.03 (Page 1978).

<sup>4</sup> This form of business organization is permitted by OHIO REV. CODE ANN. §§ 1783.01-12 (Page 1978). See generally 13 OHIO JUR. 3d *Business Relationships* §§ 1065-1075 (1979). This is a very uncommon form of business organization currently available in only two other jurisdictions. See MICH. COMP. LAWS ANN. § 449.301-316 (West 1967); N.J. STAT. ANN. § 42:3-1-30 (West 1940 & Supp. 1981). See generally 2 Z. CAVITCH, *BUSINESS ORGANIZATIONS* §§ 40.01-08 (1981) on the topic of partnership associations.

form of organization "combines features of the corporation with those of the partnership"<sup>5</sup> and is to be distinguished from the limited partnership.<sup>6</sup> According to the Attorney General of Ohio, a professional engineer may practice the occupation of engineering through a limited partnership association<sup>7</sup> and professionals such as doctors may associate as a limited partnership association.<sup>8</sup> In addition, if properly structured, the limited partnership association may be entitled to corporate tax treatment under the Internal Revenue Code.<sup>9</sup>

Nevertheless, the limited partnership association did not provide a satisfactory vehicle for professionals interested in obtaining the benefits of corporateness. In addition to some uncertainties regarding tax treatment of the limited partnership association, "practitioners have shied away from this form in favor of the more familiar corporate form, with the result that relatively few cases have arisen which construe [limited partnership association] statutes."<sup>10</sup>

In 1961 the Ohio legislature, acting pursuant to its authority to de-

<sup>5</sup> Schwartz, *The Limited Partnership Association—An Alternative to the Corporation for the Small Business with "Control" Problems?*, 20 RUTGERS L. REV. 29, 30 (1965).

Individuals who form a limited partnership association gain such corporate advantages as limited liability and the right to hold and convey property and to sue or be sued in the name of the association, while at the same time enjoying the right to keep membership in the association closed to all transferees of interests except those whom the original organizers and their duly elected transferees wish to elect as members.

*Id.* (footnotes omitted).

<sup>6</sup> The limited partnership is a very common form of business organization. It is permitted by OHIO REV. CODE ANN. §§ 1781.01-.27 (Page 1978 & Supp. 1981), which is based on the Uniform Limited Partnership Act [hereinafter U.L.P.A.] enacted in almost all states. See 6 UNIFORM LAWS ANN. 99 (Master ed. Supp. 1981), for a table of jurisdictions which have adopted the U.L.P.A. See generally Hurd & Mayer, *Ohio Limited Partnerships - Business Use and Effect*, 27 OHIO ST. L.J. 373 (1966).

<sup>7</sup> [1960] Op. Ohio Att'y Gen. No. 1502.

<sup>8</sup> [1961] Op. Ohio Att'y Gen. No. 2050.

<sup>9</sup> See *Giant Auto Parts*, 13 T.C. 307 (1949). (Ohio limited partnership association was, on facts of particular case, more closely akin to corporation than partnership; thus, it constituted an association taxable as a corporation); Treas. Reg. § 301.7701-2 (1967) (setting out those characteristics which will cause an organization to be classified as a corporation for federal income tax purposes.) Cf. *Thomas, Ltd. v. Dept. of Treasury*, 121 N.J. Super. 577, 298 A.2d 285 (1972) (New Jersey limited partnership association subject to state corporate franchise tax).

Schwartz, *supra* note 5, at 53-59, considers the tax status of limited partnership associations. He states:

[T]he tax status of the partnership association is not altogether clear. Whether such associations will be taxed as corporations or as partnerships may well depend upon whether the characteristics of the particular partnership association, as fixed by its articles of association, more nearly resemble those of the corporation or the partnership.

*Id.* at 53 (footnotes omitted).

<sup>10</sup> Schwartz, *supra* note 5, at 31 (footnotes omitted). One author, in referring to the lack of case law regarding limited partnership associations, suggests that prudent lawyers do not utilize this form of business organization. Kessler, *The Statutory Requirement of a Board of Directors of a Corporation Anachronism*, 27 U.S. CH. L. REV. 696, 718 (1960).

termine what acts a corporation may legally perform,<sup>11</sup> authorized the incorporation of professionals. While Chapter 1785 of the Ohio Revised Code uses the terminology "professional association," it is clear that a professional association in Ohio is a corporation.<sup>12</sup>

The passage of the Ohio professional association act allows Ohio professionals to obtain the benefits of the corporate form of organization. The primary benefit sought by professionals through incorporation is corporate treatment under the Internal Revenue Code.<sup>13</sup> "By incorporating and becoming employees of their own corporations, professionals have been able to gain numerous fringe benefits that are deductible to the corporation and non-income to the individual. Incorporated professionals have also been able to provide themselves with greater pension and profit-sharing plans."<sup>14</sup> It was firmly established in *O'Neill v. U.S.*<sup>15</sup> that a professional association formed under Ohio Revised Code chapter 1785 is a corporation for internal revenue purposes.

After passage of the Ohio legislation, the legal profession was still denied for a period of years the privilege of incorporating. In *State ex rel Green v. Brown*<sup>16</sup> the Supreme Court of Ohio ruled that an attorney at law licensed to practice in Ohio was not entitled to a writ of mandamus requiring the Secretary of State to accept for filing articles of incorporation for the formation of a professional association pursuant to Chapter 1785.

The admission to the practice of law is inherent in the judicial

<sup>11</sup> See *Battelle Memorial Inst. v. Green*, 29 Ohio Op.2d 388, 393 (Ohio App. 1962), *appeal dismissed*, 175 Ohio St. 132, 191 N.E.2d 804 (1963).

[U]nder the provisions of Amendment X of the United States Constitution, the right to provide for incorporation, and to determine what acts corporations shall be authorized to perform, is reserved to the states respectively. The state legislature, under authority as granted by their respective constitutions, have the power to determine, by general laws, for what purposes corporations may be formed. The states could prohibit incorporation entirely within their respective limits should they see fit to do so.

<sup>12</sup> *Lenhart v. Toledo Urology Assoc., Inc.*, 48 Ohio App.2d 249, 250, 356 N.E.2d 749, 750 (1975) ("In Ohio, the professional association organized under Revised Code Chapter 1785 should be regarded as a corporation."); Z. CAVITCH, OHIO CORPORATION LAW § 18.2 (1981); Cf. *Vesely, The Ohio Professional Association*, 13 W. RES. L. REV. 195, 197 (1962) ("strong indication that the new entity is, in fact, a corporation, despite the use of the identifying term 'professional association.'").

<sup>13</sup> See *Dunkel, Professional Corporations*, 22 OHIO ST. L.J. 703 (1961); *Vesely, supra* note 12, at 195-196. Cavitch states: "[In passing Chapter 1785] Ohio became one of many states in which the legislatures attempted to come to the tax aid of professional people who were theretofore unable to incorporate." Z. CAVITCH, OHIO CORPORATION LAW § 18.1 (1981).

For an account of the Internal Revenue Service's persistent opposition to corporate tax treatment for professionals and its lack of success in this resistance, see 4A Z. CAVITCH, BUSINESS ORGANIZATIONS § 81.01-.04 (1981).

<sup>14</sup> *Briner, Federal Income Tax Developments: 1977*, 11 AKRON L. REV. 225, 268 (1977).

<sup>15</sup> *O'Neill v. U.S.*, 281 F. Supp. 359 (N.D. Ohio 1968), *aff'd*, 410 F.2d 888 (6th Cir. 1969). "However, it should be noted that the professional must do more than form a corporation in name alone; he must also operate under state statutes as a corporation." *Briner, supra* note 14, at 269. See *Susman, The Roubik Case: How Not to Run a Professional Corporation*, 16 PRAC. LAW. 73 (April 1970).

<sup>16</sup> *State ex rel. Green v. Brown*, 173 Ohio St. 114, 180 N.E.2d 157 (1962).

branch of government, and the admission procedure in Ohio is determined by this court, both as a result of its inherent power and by virtue of statute (Section 4705.01, Revised Code) . . . .

. . . And until such time as this court, through its rules for admission to the practice of law, recognizes the right of a corporate entity to practice law, the Secretary of State is under no clear duty to accept for filing and record articles of incorporation which set forth that a purpose of the corporate entity is to "practice law."<sup>17</sup>

Despite the fact that in 1962 the American Bar Association Committee on Professional Ethics rendered an opinion that the practice of law by a professional association or corporation does not necessarily violate professional ethics,<sup>18</sup> in 1964 the Ohio Supreme Court, in a per curiam opinion, again denied a writ of mandamus on facts similar to those in *Green*.<sup>19</sup> It was not until 1970 that the Ohio Supreme Court promulgated a rule permitting a professional association to practice law in Ohio.<sup>20</sup>

## II. ORGANIZING THE PROFESSIONAL ASSOCIATION

### A. In General

"The mechanics of forming a professional association are essentially the same with respect to any Ohio corporation."<sup>21</sup> Only one incorporator

<sup>17</sup> *Id.* at 115, 180 N.E.2d at 158.

<sup>18</sup> ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 303 (1962), reprinted in, 48 A.B.A.J. 159 (1962).

<sup>19</sup> *State ex rel. Green v. Brown*, 176 Ohio St. 155, 198 N.E.2d 447 (1964). In *Cleveland Clinic v. Sombrio*, 6 Ohio Misc. 48, 215 N.E.2d 740 (Akron Mun. Ct. 1966), the defendant attempted to defeat a claim by a medical professional corporation for professional services. Defendant argued that the item "represents a charge for professional services, constituting the practice of medicine, which a corporation is not authorized to perform in the state of Ohio." *Id.*, 215 N.E.2d at 741. The defendant cited the second of the *Green v. Brown* cases. *Id.* The court declined to strike the item from the petition, stating:

The *Green v. Brown* cases do not strike down corporate practice of other professions. Their reasoning in brief is that admission to the practice of law is a function of the judicial branch of the government exercised in Ohio solely by the Ohio Supreme Court . . . . In effect, the Supreme Court has said that the legislative branch of the government may not usurp a judicial prerogative.

With respect to the practice of medicine the situation is otherwise. The licensing of physicians is carried out by a state medical board established by and exercising powers conferred upon it by the General Assembly. The practice of medicine is, of course, one of the professions—anciently limited to the law, medicine, and the clergy—and it may very well be that the practice of any profession by a corporation or other artificial entity was repugnant to the common law. But this court is unable to say that the legislative branch, whose authority to control by general law the whole field of medical practice seems unquestioned, may not authorize one or more licensed physicians to organize a corporation to engage in corporate form in the group practice of medicine, as provided for by Chapter 1785, Revised Code.

*Id.* at 49, 215 N.E.2d at 741. *Cf. State Bd. of Accountancy v. Eber*, 149 So.2d 81, 83 (Fla. App. 1963) (a rule of the Florida Accountancy Board cannot be read as forbidding accountants from incorporating under the Florida Professional Service Corporation Act since incorporation had "been sanctioned by the legislative body which gave to the board its power to promulgate rules and regulations concerning professional conduct.")

<sup>20</sup> OHIO S. CT. R. XVII B (1970). The current rule is OHIO S. CT. GOV'T. R. III.

<sup>21</sup> Z. CAVITCH, OHIO CORPORATION LAW § 18.31 (1981).

is required to form a professional association,<sup>22</sup> although it is uncertain whether the incorporators must be professionals and whether, for example, the attorney setting up the corporation could act as an incorporator<sup>23</sup> for a medical professional association.

The articles of incorporation are similar to those of a business corporation,<sup>24</sup> except for the articles regarding purpose<sup>25</sup> and, possibly, name.<sup>26</sup> An appointment of a statutory agent must be filed with the articles of incorporation.<sup>27</sup> If the professional corporation begins business before the amount of stated capital set forth in the articles of incorporation has been paid in, the incorporators and directors responsible for the premature commencement of business will be jointly and severally liable for the amount the stated capital exceeds the capital actually paid in.<sup>28</sup> In addition, state and federal securities laws must be complied with. With respect to the Ohio Securities Act,<sup>29</sup> this would usually mean utilizing the so-called "3-0" exemption.<sup>30</sup> As to the Federal Securities Act of 1933,<sup>31</sup> counsel's primary

<sup>22</sup> OHIO REV. CODE ANN. § 1701.04(A) (Page 1978).

<sup>23</sup> One early commentator on the Ohio statute stated that "in view of the express language of section 1785.02 providing for organization by professionally licensed individuals, the better practice would be to use such professional persons as the incorporators." Vesely, *supra* note 12, at 198. A later commentator referring to the same statutory section stated:

It is more reasonable to believe that the selection of incorporators in Ohio is so routine that the legislature never considered them at all and consequently, when it placed restrictions on the persons who could "organize" a professional association it did not thereby intend to place restrictions on the incorporators who could "form" the corporation.

Smith, *Professional Corporations in Ohio: The Time for Statutory Revision*, 30 OHIO ST. L.J. 439, 444 (1969).

Cavitch states: "Any person may be an incorporator; the Secretary of State's office will not require that a licensed professional must so act." Z. CAVITCH, OHIO CORPORATION LAW § 18.31 (1981).

<sup>24</sup> OHIO REV. CODE ANN. § 1701.04 (Page 1978) deals with the contents of a corporation's articles. See also Celebrezze and Biancamano, *Corporate Filings in Ohio: A Procedural Guide*, 29 CLEV. ST. L. REV. 179, 181-82 & 184-85 (1980).

<sup>25</sup> See *infra* section II(C). Cavitch states:

In view of the strict statutory limitation on the permitted purpose of a professional association, the purpose clause of a professional association should set forth only the particular professional purpose for which the professional association is being organized. The typical provisions purporting to give the corporation the power to acquire subsidiaries, other businesses, etc., should not be used.

Z. CAVITCH, OHIO CORPORATION LAW § 18.32 (1981).

<sup>26</sup> See *infra* notes 39-44, and accompanying text.

<sup>27</sup> OHIO REV. CODE ANN. §§ 1701.04(C) & 1701.07(B) (Page 1978 & Supp. 1981).

<sup>28</sup> *Id.* § 1071.12 (Page 1978). The amount of stated capital set forth in a corporation's articles as that with which it will begin business may not be less than \$500. *Id.* § 1701.04(A)(5) (Page 1978).

<sup>29</sup> *Id.* §§ 1707.01-.99. (Page 1978 & Supp. 1981).

<sup>30</sup> *Id.* § 1707.30(O) (Page Supp. 1981). See Z. CAVITCH, OHIO CORPORATION LAW §§ 16.37 (1981) for a helpful guide to the 3-0 exemption. The 3-0 exemption is perfected by notification to the Division of Securities on Form 3-0 within sixty days of the sale of the stock. *Id.* § 16.37[8].

<sup>31</sup> 15 U.S.C. §§ 77A-77AA (1976).

concern will be to insure that the issuance of stock in the professional corporation is exempt from the act.<sup>32</sup>

The proposed Ohio Professional Corporation Act does not contain any provisions that alter significantly the mechanics of organizing a professional corporation. This is understandable because current Ohio law does not present significant problems in the organization of a professional association. The Proposed Act would, however, provide that "[n]o professional corporation . . . shall begin to render professional services in this state until it has filed a copy of its articles with each licensing authority having jurisdiction over a type of professional services described in its articles."<sup>33</sup> Since a corporation in Ohio begins its legal existence when the articles are filed with the Secretary of State,<sup>34</sup> presumably corporate existence would not be affected by a failure to file the articles with the requisite licensing body(ies) prior to commencing business. It would be grounds, however, for an action to cancel the professional corporation's franchise under the *quo warranto* provision of the Proposed Act.<sup>35</sup>

One change in current law which should also be considered is an exemption of shares in a professional corporation from the Ohio Securities Act. The drafters of the Model Professional Corporation Act recommend such a change in state blue sky laws.<sup>36</sup>

## B. Name

There is no express provision in the Ohio professional associations statute dealing with names of professional association. Therefore, the provisions of the general corporation law dealing with corporate names are applicable to professional associations.<sup>37</sup> The general corporation law requires that the name of a corporation end with or include "Company," "Co.," "Corporation," "Corp.," "Incorporated," or "Inc."<sup>38</sup> In addition, in selecting

<sup>32</sup> See generally, Z. CAVITCH, OHIO CORPORATION LAW § 19.32[2] (1981) dealing with the intrastate offering exemption.

<sup>33</sup> Proposed Act, *supra* note 2, § 1785.19.

<sup>34</sup> OHIO REV. CODE ANN. § 1701.04(D) (Page 1978).

<sup>35</sup> Proposed Act, *supra* note 2, § 1785.20.

<sup>36</sup> See Report, *supra* note 2, at 315:

In most states the interest of a partner in a professional partnership is exempted by definition or otherwise from the application of the state securities law. A few states have exempted shares of a professional corporation, but many states have ignored this problem in enacting professional corporation laws. Because the "one subject" requirement of state constitutions may prohibit amendment of the state securities law in a professional corporation act, the model act does not create a securities law exemption for shares of professional corporations. It is recommended, however, that shares of professional corporations be exempted from the state securities law by appropriate amendment of that law.

<sup>37</sup> OHIO REV. CODE ANN. §§ 1701.04(A)(1) & 1701.05 (Page 1978).

<sup>38</sup> *Id.* at § 1701.04(A)(1) (Page 1978). One author states that it was not intended by the drafters of the act that this section would apply to professional corporations. He writes, "the reference in section 1785.08 of the Revised Code to the requirements of section 1701.06(A) instead of section 1701.04(A)(1) apparently was inadvertent." Vesely, *supra* note 12, at 199 n.27.

a name for a professional association, one should keep ethical considerations in mind. "It should be assumed . . . that articles will not be accepted for filing if the corporate name is one which clearly violates the standards of practice of a particular profession."<sup>39</sup>

"Attorneys who incorporate must also abide by the applicable Supreme Court rules."<sup>40</sup> The Supreme Court rule that originally permitted incorporation of lawyers under Chapter 1785 required the name of a legal professional association to

consist only of the surname of one or more of the active shareholders, and, if desired, of one or more persons who were associates with its immediate individual or partnership predecessor in the practice of law, and shall end with the legend, "Co., L.P.A."; provided that the surname of any active shareholder may be retained in the name after his death, retirement or inactivity because of age or disability, in accordance with the provisions of the Code of Professional Responsibility with reference to law firm names.<sup>41</sup>

The successor rule continued these requirements except that it now permits the name of a legal professional association to end with either "Co., L.P.A." or the words "A Legal Professional Association."<sup>42</sup>

In addition to the Supreme Court rule, the Ohio Code of Professional Responsibility for Lawyers, as amended in 1979, states: "The name of a professional corporation . . . may contain 'P.C.' or 'P.A.' or similar symbols indicating the nature of the organization."<sup>43</sup> In summary, then, it would seem that the name of a legal professional association could end in any one of a number of possible ways including: (1) "Co., L.P.A."; (2) "A Legal Professional Association"; (3) "P.C."; (4) "P.A."; (5) certain other undefined symbols indicating the nature of the organization.

One author has written that "the Secretary of State has followed the Supreme Court rule and accepted incorporation of lawyers with the legend 'A Legal Professional Association' even though it does not comply with Section 1701.04(A)(1) O.R.C."<sup>44</sup> Presumably the Secretary of State would accept articles of incorporation including any of the other endings permitted by the Court Rule or the Code of Professional Responsibility.

The proposed Ohio Professional Corporation Act provides that the

<sup>39</sup> Z. CAVITCH, OHIO CORPORATION LAW § 18.33 (1981). *But see* Dunkel, *supra* note 13, at 710: "Apart from ethical considerations, such names as 'Ace Personal Injury Service, Inc.', 'Painless Extractions, Inc.', and 'Head to Toe Medical Corporation' would nevertheless be permissible under the act."

<sup>40</sup> Z. CAVITCH, OHIO CORPORATION LAW § 18.33 (1981).

<sup>41</sup> OHIO S. CT. R. XVII B § 2(A) (1970).

<sup>42</sup> OHIO S. CT. GOV'T R. III § 2(A).

<sup>43</sup> OHIO CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS, D.R. 2-102(B).

<sup>44</sup> Hopkins, *Incorporation of Lawyers Revisited*, 51 CLEV. B.J. 144, 146 (1980).



name of a professional corporation formed under Ohio law or licensed to do business in Ohio "[s]hall contain the words 'professional corporation' or the abbreviation 'P.C.'"<sup>45</sup>

### C. Purpose and Permissible Activities

The Ohio professional association law authorizes the formation of professional associations for the sole purpose of rendering services in a single profession.<sup>46</sup> Incorporation under the act is available to "certified public accountants, licensed public accountants, architects, attorneys, chiropractors, dentists, pharmacists, optometrists, physicians and surgeons, and practitioners of limited branches of medicine or surgery as defined in section 4731.15 of the Revised Code, psychiatrists, professional engineers, and veterinarians."<sup>47</sup>

Although the professional association law requires that the sole purpose of such association be the rendering of professional services, the general corporation law, which is made applicable to professional associations, gives corporations broad statutory powers for use in carrying out the purposes set forth in the articles of incorporation.<sup>48</sup> These powers include, among other things, the power to purchase property of any description, to form or acquire the control of other corporations, to perform acts incidental to the purposes stated in the articles, and to invest funds in shares

<sup>45</sup> Proposed Act, *supra* note 2, § 1785.04(A). The Proposed Act provides, in addition, the name of the professional corporation "[s]hall otherwise conform to any rule promulgated by a licensing authority having jurisdiction of a professional service described in the articles . . . ." *Id.* § 1785.04(C).

<sup>46</sup> OHIO REV. CODE ANN. §§ 1785.01(B) & 1785.02 (Page 1978). See also OHIO S. CT. GOV'T RULE III § 3E: "Professional associations between lawyers and members of other professions or non-professional persons are not permitted where any part of an association's activities consist of the practice of law." One author states, "The 'one profession' limitation seems to be a fundamental part of the professional corporation concept. For many professions this requirement echoes the ethical standards or professional licensing standards applicable to a group practice." Smith, *supra* note 23, at 447.

In Ohio there is currently one exception to the single profession limitation on the purposes of professional associations. Architects and engineers are currently permitted to practice together in a single professional association. OHIO REV. CODE ANN. § 1785.01(B) (Page 1978) and § 4703.18 (Page 1977).

<sup>47</sup> OHIO REV. CODE ANN. § 1785.01(A) (Page 1978). Limited branches of medicine and surgery would include, among others, naprapathy, spondylotherapy, mechanotherapy, neuropathy, electrotherapy, hydrotherapy, suggestive therapy, psychotherapy, magnetic healing, Swedish movements, massage and cosmetic therapy. *Id.* § 4731.15 (Page 1977). Note that podiatry is not expressly included in § 1785.01(A) as a listed profession and is specially excluded from the definition of limited branches of medicine in § 4731.15. The Attorney General of Ohio has ruled, however, that podiatry has historically been treated as a profession in Ohio and that podiatrists therefore render "professional services" within the meaning of the professional association law and may form a professional corporation thereunder. [1979] Op. Ohio Att'y Gen. No. 79-009. However, the Attorney General has also ruled that "[p]hysical therapy is not included among the callings carefully enumerated in R.C. Chapter 1785. Hence, I cannot conclude that authority to incorporate under R.C. Chapter 1785 may be implied." [1980] Op. Ohio Att'y Gen. No. 80-004. The opinion continued, however, that "the opportunity for incorporation is not wholly denied to professional therapists because a corporation to provide physical therapy services may be formed under R.C. Chapter 1701." *Id.*

<sup>48</sup> OHIO REV. CODE ANN. § 1701.13(F) (Page 1978).

of stock or securities, regardless of the purpose.<sup>49</sup> The interplay between the sole purpose requirement of the professional association law and the broad statutory power provision of the general corporation law

raises a number of questions about the manner in which the professional association utilizes its funds. May the three shareholder medical association purchase land and build a one-story office building? May it build a ten-story office building if it only uses one-half of one floor? May it invest its excess funds in raw land or in an apartment project?<sup>50</sup>

The answers to some of these questions are unclear.<sup>51</sup>

As originally introduced, the Ohio professional association legislation would have permitted a professional association to "invest its funds in real estate, mortgages, stocks, bonds, or any type of investment and [to] own real or personal property necessary for rendering its professional service."<sup>52</sup> Such a provision would have averted some of the questions presented by the bill as enacted. One commentator has suggested that "[t]he Ohio statute should be revised to expressly permit the professional association to make unrelated investments."<sup>53</sup>

The proposed Ohio Professional Corporation Act would, as a general rule, permit the organization of a professional corporation "only for the purpose of rendering professional services and services ancillary thereto within a single profession."<sup>54</sup> As an exception to this general rule, the proposed act provides:

A professional corporation may be organized for the purpose of rendering professional services within two or more professions and for any purpose or purposes for which corporations may be organized under Chapter 1701 of the Revised Code to the extent that such combination of professional purposes or of professional and business purposes is expressly authorized by the licensing laws of this state applicable to such professions and rules and regulations thereunder.<sup>55</sup>

<sup>49</sup> *Id.*

<sup>50</sup> Smith, *supra* note 23, at 447.

<sup>51</sup> See Dunkel, *supra* note 13, at 709, wherein the author states, "The question of what is 'incidental' to a professional service might cause some differences of opinion. For example, a medical corporation can probably own a building to house its offices, but may it operate a drugstore?"

<sup>52</sup> *Id.* Compare MICH. COMP. LAWS ANN. § 450.227 (West Supp. 1981), providing: "This act or any other provisions of existing law applicable to corporations shall not prohibit the corporation from investing its funds in real estate, mortgages, stocks, bonds or any other type of investments; [or] from owning real or personal property necessary for the rendering of professional services . . . ."

<sup>53</sup> Smith, *supra* note 23, at 448.

<sup>54</sup> Proposed Act, *supra* note 2, § 1785.02(A).

<sup>55</sup> *Id.* § 1785.02(B) Compare MICH. COMP. LAWS ANN. § 450.222(b) (West Supp. 1981):

"Professional corporation" means a corporation which is organized under this act

The comment to this proposed section indicates that the intent is "to permit combination of professional purposes and of professional and business purposes as authorized by applicable licensing laws. The public policy and ethical considerations that restrict some professional groups to a single field do not apply to all professions."<sup>56</sup>

### III. OPERATING THE PROFESSIONAL ASSOCIATION

#### A. *In General*

The professional association law makes the general business corporation law applicable to professional associations. When the general business corporation law and the professional association law conflict, the professional association law takes precedence.<sup>57</sup> Consequently, the operation of a professional association generally parallels that of a business corporation. Thus, for example, the board of directors of a professional association could utilize the provisions of the general corporation law permitting telephonic meetings<sup>58</sup> or action without a meeting through the filing of written consents.<sup>59</sup> In addition, shareholders in professional associations would be afforded the rights given shareholders by the general corporation law including, for example, the right to inspect corporate books and records.<sup>60</sup> In some situations, however, operation of a professional association presents problems not encountered in the operation of a business corporation.

#### B. *Rendering of Professional Services*

The Ohio professional association statute provides that "[a] professional association may render professional service only through officers, employees, and agents who are themselves duly licensed or otherwise legally authorized to render professional service within the state."<sup>61</sup> The act does not prohibit

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which has as its shareholders only individuals who themselves are duly licensed or otherwise legally authorized within this state to render the same professional services as the corporation . . . .

<sup>56</sup> Proposed Act, *supra* note 2, comment to § 1785.02.

<sup>57</sup> OHIO REV. CODE ANN. § 1785.08 (Page 1978).

<sup>58</sup> *Id.* § 1701.61(B).

<sup>59</sup> *Id.* § 1701.54.

<sup>60</sup> *Id.* § 1701.37(C).

<sup>61</sup> *Id.* § 1785.03. One opinion of the Ohio Attorney General suggests that an Ohio professional association may not render professional services through an independent contractor. The opinion, in referring to this section of the act, states: "There is considerable doubt in my mind that this provision is capable of being extended to include the rendering of professional services by independent contractors." [1963] Op. Ohio Att'y Gen. No. 82. Since the contract in question involved non-professional services, the opinion did not pursue the issue. If the term "agent" as used in OHIO REV. CODE ANN. § 1785.03 (Page 1978) is given its common law agency meaning, then it is clear that a professional association may render services through some independent contractors. See RESTATEMENT (SECOND) OF AGENCY § 2(3) (1957) (Some independent contractors are agents). If the word "agent," as used in the act, *excludes* all independent contractors, then the use of the word would possibly be redundant since the word "servant" is also used. See *Id.* § 2(3), comment b: "An agent who is not a servant is, therefore, an independent contractor when he contracts to act on account of the principal."

the professional association from employing clerical and technical employees to render services of a non-professional nature.<sup>62</sup> In addition, the act provides that the term "employee" as used in this section does not include any "person who performs all his employment under the direct supervision and control of an officer, agent, or employee who is himself rendering professional service to the public on behalf of the corporation."<sup>63</sup> The intent of this last provision is unclear. "Possibly it has reference to medical and dental assistants, lab technicians, and other persons whose work might be viewed as being more directly a part of the professional services which the association performs, in contrast to the administrative work of secretaries, bookkeepers, and the like."<sup>64</sup>

The proposed Ohio Professional Corporation Act contains a provision similar to that in the current law.<sup>65</sup>

### C. *Annual Report Requirement*

To prevent non-professionals from using professional corporations to render professional services,<sup>66</sup> the Ohio professional association law requires that every professional association

within thirty days after the thirtieth day of June in each year, furnish a statement to the secretary of state showing the names and post office addresses of all shareholders in such corporation and shall certify that all shareholders are duly licensed or otherwise legally authorized to render professional service in the state.<sup>67</sup>

"There is no explicit procedure established in the professional association statute for enforcing the annual report requirement."<sup>68</sup> Nevertheless, the Ohio Secretary of State, after notice of failure to report and a grace period, will cancel the articles of incorporation of a non-complying professional association.<sup>69</sup>

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<sup>62</sup> OHIO REV. CODE ANN. § 1785.03 (Page 1978).

<sup>63</sup> *Id.*

<sup>64</sup> Vesely, *supra* note 12, at 202.

<sup>65</sup> Proposed Act, *supra* note 2, § 1785.05. This section provides in part:

A professional corporation, domestic or foreign, may render professional services in this state only through natural persons permitted to render such services in this state; but nothing in Chapter 1785 of the Revised Code shall be construed to require that any person who is employed by a domestic or foreign professional corporation be licensed to perform services for which no license is otherwise required . . . .

<sup>66</sup> One author states, "The one common thread which runs throughout all of the [state professional corporation] statutes is a legislative policy of preventing professional corporations from being used to provide professional services which the non professionals would not otherwise be authorized to provide." Smith, *supra* note 23, at 443.

<sup>67</sup> OHIO REV. CODE ANN. § 1785.06 (Page 1978).

<sup>68</sup> Smith, *supra* note 23, at 456.

<sup>69</sup> See Celebrezze and Biancamano, *supra* note 24, at 185:

If a corporation fails to file the report by July 31, the Secretary of State will send notice of the failure by certified mail to the last known address of the corporation or to its statutory agents. If the report is not filed after an additional grace period of thirty days, the articles of incorporation are cancelled and notice is given to the corporation by

While one writer has criticized the annual report requirement, arguing for policing of licensing requirements by professional licensing organizations instead of by the secretary of state,<sup>70</sup> the proposed Ohio Professional Corporation Act retains the annual report requirement while modifying the contents somewhat.<sup>71</sup> The Proposed Act would permit shares in an Ohio professional corporation to be issued or transferred not only to persons licensed in Ohio but also to professionals licensed elsewhere in the United States,<sup>72</sup> and would require at least one-half the directors and all officers except the secretary and treasurer be licensed in Ohio or elsewhere in the United States to render a professional service described in the corporation's articles.<sup>73</sup> Under the Proposed Act, the annual report would certify that these requirements are met.<sup>74</sup> In addition, foreign professional corporations would be expressly subjected to the annual report requirement.<sup>75</sup>

Further, the Proposed Act, unlike the current professional association law, expressly provides a method of enforcing the annual report requirement. The Secretary of State, after notice and a ninety-day grace period, would be required to cancel the articles or license of a non-complying domestic or foreign professional corporation.<sup>76</sup>

#### D. *Liability of Shareholders*

The Ohio professional association act does not expressly deal with the question of whether a shareholder in a professional association receives limited liability. The act states that it does "not modify any law applicable to the relationship between a person furnishing professional service and a person receiving such service, including liability arising out of such professional service."<sup>77</sup>

The meaning and effect of the wording are unclear. Several cases<sup>78</sup>

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certified mail. A corporation whose articles have been cancelled may return to good standing by filing an application for reinstatement with a ten dollar fee and all required annual reports. If the cancellation has been in effect for more than one year, the corporation must also submit a D-3 certificate which may be obtained from the Ohio Department of Taxation. [Citations omitted]

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<sup>70</sup> Hopkins, *supra* note 44, at 146. This author makes the point that "if corporations need to be policed, all of them need to be policed whether professional or not, and that if professionals need to be policed, they need to be policed whether incorporated or not . . ." *Id.*

<sup>71</sup> Proposed Act, *supra* note 2, § 1785.18.

<sup>72</sup> *Id.* § 1785.08.    <sup>73</sup> *Id.* § 1785.12.    <sup>74</sup> *Id.* § 1785.18(A).

<sup>75</sup> *Id.*    <sup>76</sup> *Id.* § 1785.18(C).

<sup>77</sup> OHIO REV. CODE ANN. § 1785.04 (Page 1978).

<sup>78</sup> O'Neill v. U.S., 281 F. Supp. 359 (N.D. Ohio 1968), *aff'd*, 410 F.2d 888 (6th Cir. 1969) (Ohio professional association is a corporation for federal income tax purposes and has, *inter alia*, the attribute of limited shareholder liability); Lenhart v. Toledo Urology Assoc., Inc., 48 Ohio App.2d 249, 250, 356 N.E.2d 749, 750 (1975) ("A medical association has the same general liability features as a general corporation."). Cf. Birt v. St. Mary Mercy Hospital, 370 N.E.2d 379 (Ind. App. 1977) (interpreting similar provision in Indiana statute).

and commentators<sup>79</sup> have suggested that shareholders in an Ohio professional association do receive the benefit of limited liability. If one assumes that these authorities are correct, one can question the extent of immunity from suit. It has been suggested that provisions like that in Ohio may protect the professional shareholder from liability based solely on his status as shareholder, while retaining such common law liabilities "as a physician's vicarious liability for the negligence of assistants under his control and the professional's contract liability for failure to provide a promised result."<sup>80</sup> This approach distinguishes between duties arising out of the professional relationship and all other duties, with the shareholders in a professional association obtaining limited liability only as to the latter.<sup>81</sup>

Regardless of the proper interpretation of this provision of the Ohio professional association law, attorneys who form a professional association do not receive the benefit of limited liability. When the Supreme Court of Ohio authorized incorporation of attorneys, it conditioned attorney participation as a shareholder in a professional association upon an undertaking by that individual to "guarantee the financial responsibility of the association

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<sup>79</sup> See Z. CAVITCH, OHIO CORPORATION LAW § 18.23 (1981). Cavitch argues that the Ohio provision is intended to preserve the "legal privilege of communication between certain professional persons—for example, attorneys—and their clients" and to preserve "the unlimited liability of the professional person to the person who receives his service." *Id.* Shareholders other than the one(s) rendering the service would have limited liability. See also Hopkins, *supra* note 44, at 144 ("There is limited liability under the Ohio professional corporation law."); and Vesely, *supra* note 12, at 203, wherein the author states:

Since the statute refers to the person who performs and the person who receives professional service, apparently it does not affect the liability of the shareholders of a professional association in their capacity as shareholders. As a matter of corporate law, therefore, shareholders would have no liability as shareholders for corporate obligations.

He concludes that "it seems reasonably clear that the Ohio law follows the usual corporate rule of limited shareholder liability." *Id.* But see Comment, *Unreasonable Compensation in the Professional Corporation*, 13 AKRON L. REV. 540, at note 2, and accompanying text (1980).

<sup>80</sup> Note, *Professional Corporations and Associations*, 75 HARV. L. REV. 776, 781 (1962). This writer argues that "[s]ince it is inconceivable that a professional-association statute could be taken to repeal the professional practitioner's common law liability for torts he personally commits, the qualification is mere supererogation unless it saves more than that liability." *Id.*

Cavitch suggests the provision may have been intended, among other things, to preserve legal privileges. See *supra* note 79. If so, then the provision would not be superfluous.

<sup>81</sup> See *Boyd v. Badenhausen*, 556 S.W.2d 896 (Ky. 1977), for a case which may have accepted this bifurcated duty approach. In holding that a shareholder in a medical professional corporation may be personally liable for the acts of corporate employees, the court states:

[A] physician [is] responsible for the derelictions of persons employed by a corporation to carry out for him the clerical details that are necessary to the successful performance of this duty to render skillful care and attention to whomever he accepts as a patient.

... Placing a layer of other people, by whomsoever they may be employed, between a physician and his patient does not alter the situation, because the physician's professional duties are not susceptible of being delegated or diffused.

*Id.* at 899. The court did not indicate its view as to breaches of non-professional duties.

for its breach of any duty, whether or not arising from the attorney-client relationship."<sup>82</sup>

The proposed Ohio Professional Corporation Act does not contain a provision dealing with the liability of shareholders in a professional corporation. It would continue to provide that the professional corporation law does "not modify any law applicable to the relationship between a person furnishing professional service and a person receiving such service, including liability arising out of such professional service."<sup>83</sup> It is hard to understand the omission of an express provision dealing with this question, but several possible reasons exist. First, the drafters may have felt that since the weight of authority indicates that shareholders in a professional association have limited liability,<sup>84</sup> such provision is unnecessary. Second, the drafters may have believed that the substitution in the act of the words "professional corporation" for the words "professional association" implies full corporate status including limited liability for shareholders.<sup>85</sup> Finally, it may have been that the members of the Corporation Law Committee of the bar association were unable to achieve a consensus on this matter.

The Model Professional Corporation Act provides three alternative subparagraphs which a jurisdiction may enact to deal with the personal liability of shareholders of professional corporations.<sup>86</sup> The first alternative provides that the liability of the shareholder shall be no greater than that of a shareholder in a general business corporation.<sup>87</sup> The second provides that the liability of a shareholder in a professional corporation shall be the same as that of a partner in a partnership.<sup>88</sup> The third and perhaps most intriguing alternative provides that a shareholder is liable to the same extent as a partner in a partnership unless the professional corporation has provided security for professional responsibility by way of insurance or a bond in a specified minimum amount.<sup>89</sup>

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<sup>82</sup> OHIO S. CT. GOV'T R. III § 4. This rule only applies to attorneys and does not affect other professions. See *Fure v. Sherman Hospital*, 55 Ill. App.3d 572, 371 N.E.2d 143 (1977), where the plaintiff attempted to utilize a similar rule of the Illinois Supreme Court to hold a physician-shareholder liable.

It is unclear whether the Ohio Supreme Court's passage and retention of this requirement is any indication that it views OHIO REV. CODE ANN. § 1785.04 (Page 1978) as providing limited liability to shareholders in a professional association. If this section does not provide limited liability, the rule is superfluous; if it provides limited liability only as to breaches of non-professional duties, then the rule is broader than necessary.

<sup>83</sup> Proposed Act, *supra* note 2, § 1785.06.

<sup>84</sup> See *supra* note 78 and 79.

<sup>85</sup> See Proposed Act, *supra* note 2, § 1785.01(B).

<sup>86</sup> M.P.C.A., *supra* note 2, § 11.

<sup>87</sup> *Id.* § 11(d) (alternate 1).

<sup>88</sup> *Id.* § 11(d) (alternate 2).

<sup>89</sup> *Id.* § 11(d) (alternate 3). The minimum amount could be set for each profession by the applicable licensing authority. If a licensing authority failed to set a minimum amount, the minimum amount set out in the Act would apply. *Id.* § 11(d)(2).

If the Ohio professional association law is revised, the Ohio legislature should clarify the extent of shareholder liability by adopting one of these three Model Act alternatives, preferably the first or third.<sup>90</sup>

### E. *Officers and Directors*

While the Ohio professional association act requires that all shareholders be licensed members of the profession for which the association was formed,<sup>91</sup> officers and directors of the professional association need not be shareholders or licensed members of the profession.<sup>92</sup> If an officer of the professional corporation is to render professional services, however, the statute would require him or her to be a licensed member of the appropriate profession.<sup>93</sup>

Even though the statute permits non-professional directors, "[c]learly, the best and least dangerous course of action for the professional corporation is to have professionally qualified directors . . . ."<sup>94</sup> This would prevent unlicensed persons from controlling the professional corporation, a situation which may, in itself, be problematic.<sup>95</sup> By comparison, it may make sense for non-members of the relevant profession to hold certain offices in a professional corporation if "they are not shareholders or directors and do not provide professional services. This would permit the engi-

<sup>90</sup> There is nothing unethical or improper in limiting the liability of shareholders in a professional corporation if the clients of the corporation are aware of it. See Smith, *supra* note 23, at 449-50.

<sup>91</sup> OHIO REV. CODE ANN. §§ 1785.05 & 1785.07 (Page 1978).

<sup>92</sup> "There is apparently no requirement that the officers and directors of the professional corporation be shareholders or licensed members of a profession." Dunkel, *supra* note 13, at 709. "There is no statutory requirement, as there is in the laws of many states, that the directors and officers be licensed professional persons." Vesely, *supra* note 12, at 202. But see Smith, *supra* note 23, at note 58, and accompanying text. While Smith agrees that the act does not appear to require officers to be licensed members of the profession, he recognizes the possibility that a court might interpret OHIO REV. CODE ANN. § 1785.03 (Page 1978) to require all officers to be qualified members of the profession. *Id.*

<sup>93</sup> OHIO REV. CODE ANN. § 1785.03 (Page 1978).

<sup>94</sup> 4A Z. CAVITCH, BUSINESS ORGANIZATIONS § 82.03[3] (1981).

<sup>95</sup> Cavitch states:

Unless . . . the manager of the [professional] corporation, those in direct control of its policies and operations, are qualified professional persons, the operation of that corporation must be in violation of specific and well-defined standards of professional conduct. In a corporation organized to render legal services, for example, participation in the formulation and effectuation of corporate policies and operations by a non-lawyer would be violative, either actually or potentially, of the following standards of conduct of the legal profession:

- (1) The work of lawyers may not be directed by non-lawyers.
- (2) The services of a lawyer should not be controlled or exploited by any agency intervening between lawyer and client.
- (3) A lawyer must preserve his client's confidence.
- (4) A lawyer should not permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency.

(d. (footnotes omitted))



neering corporation to elect its internal accountant as treasurer or its house counsel as secretary."<sup>96</sup>

The proposed Ohio Professional Corporation Act would require at least half of the directors of a professional corporation to be qualified persons.<sup>97</sup> In addition, all officers other than the secretary and treasurer would have to be qualified persons.<sup>98</sup> The comment to this section of the Proposed Act states that "[i]ts purpose is to insure that professional corporations are not controlled by lay persons."<sup>99</sup>

#### F. Proxies and Voting Trusts

The Ohio professional association has no provisions dealing with proxies or voting trusts. One author states:

While the voting trust device is not mentioned in the Ohio statute, it appears that the restriction placed on the identity of the transferee of shares has the effect of preventing the use of a voting trust except when the trustee is a qualified transferee.

There is no such prohibition against granting a proxy to an unlicensed person or even to a person who has lost his license, even though such use of a proxy would be clearly contrary to the underlying legislative policy expressed by the shareholder licensing requirement.<sup>100</sup>

The same author suggests that "[t]he statute should be amended to specifically prohibit the granting of proxies to non-licensed persons and to make clear that the transferee limitations also apply to voting trustees."<sup>101</sup>

The proposed Ohio Professional Corporation Act would revise the law to provide that only proxies held by "qualified persons" and, with certain limited exceptions, only voting trusts with all trustees and beneficiaries thereof being qualified persons would be valid.<sup>102</sup> Under the Proposed Act,

<sup>96</sup> Smith, *supra* note 23, at 446. Cf. ABA COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, DISCUSSION DRAFT OF ABA MODEL RULES OF PROFESSIONAL CONDUCT, Comment to Rule 7.5, 48 U.S.L.W. 1, 27 (Special ed. Feb. 19, 1981). ("In professional corporations it is sometimes essential or convenient that a nonlawyer be an officer or director. . . . Many modern law firms employ nonlawyers to exercise broad managerial authority in the operation of the firm.").

<sup>97</sup> Proposed Act, *supra* note 2, § 1785.12.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* comment to § 1785.12. The term "qualified person" is defined in the Proposed Act to include, among others, "[n]atural persons who are authorized by law in this state or in any other state or territory of the United States or the District of Columbia to render a professional service permitted by the articles . . . ." *Id.* §§ 1785.01(E).

<sup>100</sup> Smith, *supra* note 23, at 456.

<sup>101</sup> *Id.* at 457. The policy considerations supporting a prohibition against a non-professional serving as a voting trustee or holding a proxy to vote shares in a professional corporation are similar to those supporting the prohibition against a non-professional owning shares in the corporation. See *infra* note 121.

<sup>102</sup> Proposed Act, *supra* note 2, § 1785.11. This section provides:

No proxy for shares of a professional corporation shall be valid unless it shall

a professional not licensed in Ohio could be a "qualified person" if licensed in another state, a territory or the District of Columbia.<sup>103</sup>

### G. *Conversions into Business Corporations; Mergers and Consolidations*

The Ohio professional association act does not expressly deal with the question of whether a professional association may be converted by the professionals involved into a general business corporation. The general corporation law permits amendment of a corporation's articles, including a change of the corporate purpose,<sup>104</sup> and the professional association act makes the general corporation law applicable to professional associations.<sup>105</sup> These sections, read together, would permit such a conversion. The conversion of a professional association by the professional shareholders into a business corporation is permitted by the proposed Professional Corporation Act.<sup>106</sup>

If the sole shareholder of an Ohio professional association dies or becomes incompetent, the question of whether a professional corporation may be converted into a business corporation is more acutely presented. The question in this situation is open. One author states that if the sole shareholder of an Ohio professional association dies "[o]ne might conclude that it must be dissolved."<sup>107</sup> Perhaps the general corporation law provision permitting voting by fiduciaries and executors would be available.<sup>108</sup> Even if available, the general corporation law would require that the certificate filed with the Secretary of State to amend the corporation's articles be signed by the chairman of the board, the president or a vice-president and by a secretary or an assistant secretary.<sup>109</sup> This provision could present practical problems.

The proposed Ohio Professional Corporation Act would permit the "legal representative of the estate of a deceased, incompetent, or insolvent shareholder of a professional corporation who holds all the outstanding

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be given to a qualified person. A voting trust with respect to shares of a professional corporation shall not be valid unless all trustees and beneficiaries thereof are qualified persons, except that a voting trust may be validly continued for a period of six months after the death of a deceased beneficiary or for a period of ninety days after a beneficiary has become a disqualified person.

<sup>103</sup> See *supra* note 99.

<sup>104</sup> OHIO REV. CODE ANN. § 1701.69(2) (Page 1978).

<sup>105</sup> *Id.* § 1785.08.

<sup>106</sup> Proposed Act, *supra* note 2, § 1785.15. This section provides:

If a professional corporation shall cease to render professional services, it shall amend its articles to delete from its stated purpose the rendering of professional services and to conform to the requirements of section 1701.04 of the Revised Code regarding its corporate name. The corporation may then continue in existence as a corporation under Chapter 1701 of the Revised Code and shall no longer be subject to the provisions of Chapter 1785 of the Revised Code.

<sup>107</sup> Smith, *supra* note 23, at 455.

<sup>108</sup> OHIO REV. CODE ANN. § 1701.46 (Baldwin).

<sup>109</sup> *Id.* § 1701.73(C) Akron, 1982

shares of the corporation"<sup>110</sup> to amend the articles of incorporation, thus allowing a conversion from a professional to a business corporation.

The Ohio professional association act also fails to deal with the questions of merger and consolidation. One author has stated that "[w]hile one professional corporation may not acquire the stock of another, there is no prohibition against their merger or consolidation,"<sup>111</sup> presumably believing that the merger and consolidation provisions of the general corporation law are applicable to professional associations. This author did not comment on whether an Ohio professional association can merge or consolidate with business corporations or foreign corporations and, if so, under what circumstances. One can speculate that at a minimum a combination of an Ohio professional association with an Ohio business corporation would be permitted if the surviving or new corporation is a business corporation.

The proposed Ohio Professional Corporation Act would clarify the question of the authority of an Ohio professional corporation to merge or consolidate with other corporations, domestic or foreign. The professional corporation could "merge or consolidate with another corporation, domestic or foreign, only if every shareholder of each corporation is qualified to be a shareholder of the surviving or new corporation."<sup>112</sup> This provision would allow an Ohio professional corporation to combine with a domestic or foreign professional corporation if the new or surviving corporation is a professional corporation authorized to perform the same professional service(s) as the component corporations,<sup>113</sup> or is a business corporation. In addition, an Ohio professional corporation would be permitted to combine with a domestic or foreign business corporation if the new or surviving corporation is a business corporation. A combination of an Ohio professional corporation and a domestic or foreign business corporation to form a professional corporation, however, would be permitted only if all shareholders of the business corporation are qualified members of the relevant profession(s).<sup>114</sup>

#### IV. OWNERSHIP PROBLEMS

##### A. *Repurchase and Redemption of Shares*

The Ohio professional association law restricts ownership of shares in

<sup>110</sup> Proposed Act, *supra* note 2, § 1785.13.

<sup>111</sup> Dunkel, *supra* note 13, at 710.

<sup>112</sup> Proposed Act, *supra* note 2, § 1785.14(A).

<sup>113</sup> It should be noted that under the Proposed Act an Ohio professional corporation could be formed to practice more than one profession if permitted by the applicable licensing laws. See *supra* notes 55 & 56, and accompanying text. In addition, the Proposed Act would permit professionals licensed elsewhere in the United States to be shareholders in an Ohio professional corporation. Proposed Act, *supra* note 2, § 1785.08.

<sup>114</sup> The combination of a Ohio professional corporation with a foreign professional corporation might be prevented even under the Proposed Act by the law under which the foreign corporation was formed. See, e.g., FLA. STAT. ANN. § 621.13. (West Supp. 1981), prohibiting mergers of Florida professional corporations with foreign corporations.

a professional corporation to qualified members of the profession. It is therefore incumbent upon the parties organizing a professional association to provide a means of dealing with situations which could result in an unqualified shareholder. There are two possible methods of handling these problems. The first is to have the corporation acquire the shares of the unqualified person. The second is to have the remaining qualified shareholders acquire such shares. The first possibility may be excluded by the language of the Ohio professional association statute.

The Ohio law does not expressly deal with whether a professional association may repurchase or redeem its own shares. It does provide that a shareholder may "sell or transfer his shares . . . only to another individual who is duly licensed or otherwise legally authorized to render the same professional service as that for which the corporation was organized."<sup>115</sup> One author states that "[a] literal reading of the professional association statute would lead one to conclude that the professional association cannot purchase or redeem its own shares."<sup>116</sup> It has been suggested that a redemption may be permissible since a redemption of shares, unlike a purchase, "retires the shares, restoring them to the status of authorized and unissued shares."<sup>117</sup>

There is no policy reason to support a prohibition against repurchase by the professional corporation of its own shares,<sup>118</sup> and one commentator suggested years ago that "Ohio should follow the pattern of other states, and specifically permit the professional association to purchase or redeem its shares."<sup>119</sup> The proposed Ohio Professional Corporation Act would do just that.<sup>120</sup>

## B. *Unqualified Shareholders*

While the Ohio professional association act permits a shareholder of a professional association to sell or transfer his or her shares only to another

<sup>115</sup> OHIO REV. CODE ANN. § 1785.07 (Page 1978).

<sup>116</sup> Smith, *supra* note 23, at 451. Cavitch states, "This provision seemingly precludes an arrangement whereby the professional association itself repurchases the shares." Z. CAVITCH, OHIO CORPORATION LAW § 18.24 (1981).

<sup>117</sup> Vesely, *supra* note 12, at 200. Compare OHIO REV. CODE ANN. § 1701.23 (Page 1978) (redemption of shares), with *Id.* § 1701.35 (repurchase of shares by corporation).

<sup>118</sup> Cavitch states, "There is no apparent reason for this . . . limitation." Z. CAVITCH, OHIO CORPORATION LAW § 18.24 (1981). He continues, "Some lawyers may conclude, however, that no one, not even the state, will complain if the professional association is a party to a repurchase agreement." *Id.* at § 18.34. Compare Vesely, *supra* note 12, at 200, wherein the author states:

Of course, should the professional association proceed in accordance with section 1701.35, as a practical matter the question of corporation authority may never arise. The parties should recognize, however, that in the event of some disagreement among them the aggrieved party would be able to assert this defense.

<sup>119</sup> Smith, *supra* note 23, at 452.

<sup>120</sup> Proposed Act, *supra* note 2, § 1785.10. The proposed provision would prohibit repurchase "if the corporation is insolvent or if there is reasonable ground to believe that by such purchase or redemption it would be rendered insolvent." *Id.*

licensed member of the same profession,<sup>121</sup> the effect of a transfer to an unqualified person is not stipulated. One author asks:

Is a transfer simply a void act? Or is the transfer effective, perhaps with the result that the professional association automatically loses its authority to practice the relevant profession? If the professional association automatically loses its authority, would anyone other than the state, the professional association itself, or a shareholder, be permitted to raise the point? These questions are particularly important with respect to transfers by operation of law on account of the death of a qualified shareholder. At the present time, absent an effective buy-and-sell arrangement operative at the very moment of death, the answers are unknown.<sup>122</sup>

Another commentator has proffered: "It would seem that the lack of corporate authority to continue as a professional association [due to a transfer of shares to an unqualified person] could be asserted only in the manner, and by the persons designated in [the provision of the general corporation law pertaining to ultra vires acts.]"<sup>123</sup>

<sup>121</sup> OHIO REV. CODE ANN. § 1785.07 (Page 1978). The Ohio Attorney General has rendered an opinion that:

[L]egal title to stock of a professional association may be held by a trustee of a qualified pension and profit sharing plan, licensed to render the same professional service as that for which such association was organized, so long as equitable title to the stock is also held by such professionals.

[1978] Op. Ohio Att'y Gen. No. 78-066.

Cavitch states that the restriction of share ownership to licensed professionals stems from the dictates of professional standards which prohibit

- (1) fee-splitting between a professional person and a layman;
- (2) the intervention of a lay agency between the person who renders and the person who receives professional services;
- (3) the withdrawal of the power and responsibility of decision over professional matters from the professional person; and
- (4) the use of the professional man's services or name in the unauthorized practice of the profession by a lay agency.

4A Z. CAVITCH, BUSINESS ORGANIZATIONS § 82.03[2] (1981) (footnotes omitted).

<sup>122</sup> Z. CAVITCH, OHIO CORPORATION LAW § 18.24 (1981).

<sup>123</sup> Vesely, *supra* note 12, at 201. OHIO REV. CODE ANN. § 1701.13(H) (Page 1978) provides:

No lack of, or limitation upon, the authority of a corporation shall be asserted in any action except (1) by the state in an action by it against the corporation, (2) by or on behalf of the corporation against a director, an officer, or any shareholder as such, (3) by a shareholder as such or by or on behalf of the holders of shares of any class against the corporation, a director, an officer, or any shareholder as such, or (4) in an action involving an alleged overissue of shares. This division shall apply to any action brought in this state upon any contract made in this state by a foreign corporation.

Cavitch agrees with Vesely's analysis of this section:

O.R.C. § 1701.13(H) imposes stringent limitations on the assertion of "ultra vires" with respect to a conventional corporation and, as a matter of statutory construction, it would seem that these limitations would be applicable with respect to a professional association.

Z. CAVITCH, OHIO CORPORATION LAW § 18.24, at n. 19 (1981).

*But cf.* Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 35, 193 N.E. 650, 655 (1934), holding:

It is quite generally held that the right to practice law conferred by the state is a special privilege in the nature of a franchise, and that the holder thereof may be

One clear consequence of a transfer to an unqualified shareholder is that the corporation would be unable to file the next required report with the Secretary of State certifying that "all shareholders are duly licensed or otherwise legally authorized to render professional services in this state."<sup>124</sup> The result of such omission is that the Secretary of State would, after notice and a grace period, cancel the corporation charter.<sup>125</sup>

In addition to the transfer of shares resulting from the death of a shareholder, other events could cause unqualified persons to become shareholders in a professional corporation. These would include the incompetence, divorce, insolvency, loss of license or foreclosure on the pledged stock of a professional shareholder. While a dissolution<sup>126</sup> or change of corporate purposes<sup>127</sup> may be possible, it may be the desire of the remaining shareholders to continue to operate through the professional corporation. This requires the existence of an effective means of divesting the shares of an unqualified person.

The Ohio professional association law can be a workable piece of legislation if the parties agree on all important matters in advance and use a buy-sell agreement and other carefully drawn documents.<sup>128</sup> Provision can be made for those contingencies which could result in an unqualified shareholder.<sup>129</sup> However, "[w]hile the statute may be workable under ideal circumstances, it is not workable and presents substantial interpretative problems that will require years of litigation if the parties do not properly plan the corporate organization and do not agree."<sup>130</sup>

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protected from the invasion of the right thus vested in him. The adequate remedy of such invasion is by injunction, and that is so whether the transgressor is an individual or a corporation. . . .

<sup>124</sup> OHIO REV. CODE ANN. § 1785.06 (Page 1978).

<sup>125</sup> See *supra* note 69.

<sup>126</sup> A dissolution of a professional association would be governed by the provisions of the general corporation law pertaining to dissolution, and not by the provisions of the Ohio Uniform Partnership Act. See OHIO REV. CODE ANN. § 1785.08 (Page 1978). Cf. *Melby v. O'Melia*, 93 Wis.2d 51, 286 N.W.2d 373 (1979) (shareholder of professional service corporation not entitled to an accounting and dissolution in accordance with partnership standards).

<sup>127</sup> *Supra* note 104-06.

<sup>128</sup> Smith, *supra* note 23, at 457.

<sup>129</sup> In making provision for these contingencies, counsel should bear in mind the uncertainty about whether an Ohio professional association is permitted to repurchase or redeem its own shares. *Supra* notes 115-17, and accompanying text. One author recommends:

In any event, until this problem is clarified, the shareholders of a professional association should attempt to avoid this problem by providing in the articles of incorporation that the association may redeem or purchase its own shares and by entering into a buy-sell agreement pursuant to which the association or the other shareholders are authorized to purchase a shareholder's stock in certain events, i.e. death, disability, bankruptcy and loss of license. If the buy-sell agreement provides for the purchase of a shareholder's stock by the association, it also ought to provide for a purchase by the other shareholders if the association is prevented by law from purchasing the shares.

Smith, *supra* note 23, at 451-2. This seems to be very sound advice.

<sup>130</sup> Smith, *supra* note 23, at 457.

One author states that "[t]he Ohio [professional association] law does not attempt to deal with a multiplicity of problems incident to the ownership and transfers of shares."<sup>131</sup> The proposed Ohio Professional Corporation Act, in contrast, would provide clear answers to these potentially serious problems and would provide an effective statutory mechanism for divesting unqualified shareholders of their shares in a professional corporation. The Proposed Act provides that the issuance by a corporation or transfer by a shareholder of stock in a professional corporation to an unqualified person is void.<sup>132</sup> A professional corporation could, therefore, rightfully refuse to transfer on its books the stock of an unqualified assignee.<sup>133</sup>

The Proposed Act provides, however, that it does not "prohibit the transfer of shares of a professional corporation by operation of law or court decree."<sup>134</sup> As to these situations,<sup>135</sup> it contains a well-conceived section designed to insure that the unqualified person will not remain a shareholder.<sup>136</sup> The key components of this section are, first, that "[a]ny provision regarding purchase, redemption or transfer of shares of a professional association contained in the articles, regulations or any private agreement shall be specifically enforceable in the courts . . . ."<sup>137</sup> Second, in the absence of such a provision to divest the shares of an unqualified person, the section permits the unqualified person to transfer the shares to a qualified person.<sup>138</sup> Third, in the event that there is no provision which lifts the shares of the unqualified person and no voluntary transfer of the shares by such person to a qualified person, the section provides that the shares "shall be redeemed or purchased by the corporation to the extent of funds that may be legally available."<sup>139</sup> The corporation would be obligated to pay and the unqualified shareholder to accept the "fair cash value" of the shares as of the date of the death, disqualification or transfer. The "fair cash value" is defined as "the amount which a willing seller, under no compulsion to sell,

<sup>131</sup> Vesely, *supra* note 12, at 199-200.

<sup>132</sup> Proposed Act, *supra* note 2, § 1785.08. The Proposed Act would require "[e]very certificate representing shares of a professional corporation [to] state conspicuously upon its face that the shares . . . are subject to restriction on transfer . . . ." *Id.* § 1785.08(C).

<sup>133</sup> "A transfer agent cannot arbitrarily or capriciously refuse to make a transfer of stock. If it is to be protected in its refusal, it must act in good faith and present an adequate reason for its refusal." 1 F. CHRISTY, *THE TRANSFER OF STOCK* § 51 (5th ed. 1975). The voiding by the Proposed Act of transfers to unqualified persons would provide an adequate reason for a refusal to transfer.

<sup>134</sup> Proposed Act, *supra* note 2, § 1785.08(B).

<sup>135</sup> These could include, for example, transfers brought about by the death, disqualification, incompetence, divorce or insolvency of a shareholder.

<sup>136</sup> Proposed Act, *supra* note 2, § 1785.09.

<sup>137</sup> *Id.* § 1785.09(E).

<sup>138</sup> *Id.* § 1785.09(A).

<sup>139</sup> *Id.* It should be noted that the Proposed Act would expressly permit a professional corporation to repurchase or redeem its shares, subject to an insolvency restriction. *Id.* § 1785.10. See *supra* Section IV(A) regarding the uncertainty under current law as to whether repurchase or redemption is permissible.

would be willing to accept, and which a willing buyer, under no compulsion to buy, would be willing to pay."<sup>140</sup> A judicial determination of "fair cash value" is provided for in those cases in which the parties are unable to agree.<sup>141</sup> Finally, the Proposed Act provides that if the shares of an unqualified person are not transferred to or purchased by the professional corporation or a qualified person pursuant to this section within certain time limits, the shares shall be cancelled on the books of the corporation with the unqualified shareholder's interest becoming a creditor's claim for payment.<sup>142</sup>

## V. FOREIGN PROFESSIONAL CORPORATIONS

The Ohio professional association law does not expressly state whether a foreign or out-of-state professional corporation may obtain a license to do business in the state of Ohio. While the provisions of the general corporation law are made applicable to professional associations,<sup>143</sup> the provisions for qualification of a foreign corporation are contained in a separate chapter<sup>144</sup> which is not expressly made applicable to professional associations.

In an attempt to obtain some guidance in this matter, the Ohio Secretary of State requested an opinion of the Ohio Attorney General. The Attorney General responded:

In specific answer to your question, therefore, it is my opinion and you are so advised that where each shareholder of a foreign professional corporation is licensed to render professional service by the State of Ohio and where the foreign professional corporation otherwise meets the requirements of R. C. Chapter 1785, it may properly be licensed to do business in Ohio.<sup>145</sup>

Thus, in addition to meeting the requirements applicable to all corporations seeking a license to do business in Ohio,<sup>146</sup> the application of a foreign professional corporation "must be accompanied by an affidavit signed by a corporate officer stating that each shareholder is licensed to render a professional service in the State of Ohio and that the corporation complies

<sup>140</sup> Proposed Act, *supra* note 2, § 1785.09(8).

<sup>141</sup> *Id.* The comment to this section states: "The procedure for determining fair cash value is patterned on the procedure set forth in section 1701.85 for determining fair cash value of the shares of dissenting shareholders." *Id.* comment to § 1785.09.

<sup>142</sup> *Id.* § 1785.09(C). This subsection provides:

If a purchase, redemption, or transfer of the shares of a deceased or disqualified shareholder or of a transferee who is a disqualified person is not completed within six months after the death of the deceased shareholder or ninety days after the disqualification or transfer, as the case may be, the corporation shall forthwith cancel the shares on its books and the disqualified person shall have no further interest as a shareholder in the corporation other than his right to payment for the shares....

<sup>143</sup> OHIO REV. CODE ANN. § 1785.08 (Page 1978).

<sup>144</sup> *Id.* Ch. 1703.

<sup>145</sup> [1977] Op. Ohio Att'y Gen. No. 77-018. *Accord* [1976] Op. Okla. Att'y Gen. No. 76-184.

<sup>146</sup> For a brief guide to qualifying a foreign corporation to do business in Ohio, see Celebrezze and Biancamano, *supra* note 24, at 195-199.



in all other respects with the requirements of chapter 1785."<sup>147</sup> The foreign professional corporation, once admitted, would be subject to the annual report requirement of the Ohio professional association law.<sup>148</sup>

The proposed Ohio Professional Corporation Act would permit foreign professional corporations to obtain licenses to do business in Ohio,<sup>149</sup> and would make some interesting changes in Ohio law.

To qualify to do business in Ohio, the name of the foreign professional corporation would have to meet the requirements of the Proposed Act, the purposes for which the foreign professional corporation was organized would have to be permissible purposes for organization of a professional corporation under the Proposed Act, and not less than one-half of the directors, all the officers except the secretary and treasurer, and all shareholders would have to be qualified persons.<sup>150</sup> The term "qualified persons" is defined by the Act to include, among others, "[n]atural persons who are authorized by law in this state or in any state or territory of the United States or the District of Columbia to render a professional service permitted by the articles of the professional corporation."<sup>151</sup> This represents a significant change from current practice which requires each shareholder be licensed to render professional services in the state of Ohio.<sup>152</sup> Thus, a Detroit professional corporation comprising ten professionals, two of whom were licensed to render professional services in Ohio, could be admitted as a foreign professional corporation. Of course, it could render professional services in Ohio only through professionals licensed in Ohio.<sup>153</sup>

Perhaps even more significantly, the Proposed Act provides that "[n]o foreign professional corporation shall be required to obtain a license to transact business in this state unless it shall maintain an office in this state for the conduct of business or professional practice."<sup>154</sup> The comment to this provision states that it "would permit foreign professional corporations greater freedom in rendering professional services in the state without complying with foreign corporation law requirements than is permitted in the case of business corporations."<sup>155</sup> If this provision were enacted, a non-licensed foreign professional corporation transacting business in Ohio without an office in the state would not be denied the use of the Ohio courts.<sup>156</sup> The

<sup>147</sup> *Id.* at 200.

<sup>148</sup> OHIO REV. CODE ANN. § 1785.06 (Page 1978).

<sup>149</sup> Proposed Act, *supra* note 2, § 1785.16.

<sup>150</sup> *Id.* § 1785.16(A).

<sup>151</sup> Proposed Act, *supra* note 2, §§ 1785.01(E) & 1785.08(1)(a).

<sup>152</sup> See *supra* notes 145-147, and accompanying text.

<sup>153</sup> See *supra* section III(B).

<sup>154</sup> Proposed Act, *supra* note 2, § 1785.16(B).

<sup>155</sup> *Id.* Comment to § 1785.16.

<sup>156</sup> The Ohio Revised Code contains several provisions for enforcement of the statutory requirement that a foreign corporation doing business in Ohio obtain a license. See OHIO REV.

proposed Ohio Professional Corporation Act thus would greatly facilitate multi-state professional practice.

### CONCLUSION

The Ohio professional association law was deficient when enacted twenty years ago. One early commentator stated, "As could be expected of novel legislation, some of the provisions of the act may require further clarification."<sup>157</sup> Another commentator stated that "[t]he present Ohio Professional Association Law obviously represents a first and very important step in obtaining the tax benefits of qualified pension and profit-sharing plans for professional men. [But] [t]here are a number of technical corporate problems to be corrected by the legislature."<sup>158</sup>

Seven years later, another writer argued that "many professional associations are going to be formed, operated, and dissolved during the next few years. The Ohio legislature appears to have within its reach a unique opportunity to head off a myriad of unnecessary legal problems caused by troublesome statutory language."<sup>159</sup> This author concluded that "the statutory changes required to remedy this situation are easy to visualize . . . . To pass up this opportunity to remedy a statute which may soon become a major corporate statute, would be a disservice to the professionals, to the public, and to the Bar."<sup>160</sup>

Twelve years have since passed; there are now approximately six thousand professional corporations in Ohio.<sup>161</sup> In addition, there is a proposed Ohio Professional Corporation Act, promulgated two years ago by the Corporation Law Committee of the Ohio State Bar Association, gathering dust on a shelf.<sup>162</sup> In light of this history, it is hard to understand the failure of the Ohio General Assembly to reform the Ohio professional association law. "It is time to revise our statutes and regulations to take advantage of what we have learned from experience."<sup>163</sup>

Even if the proposed Ohio Professional Corporation Act is not adopted in its entirety, some of the provisions cover serious deficiencies in the current

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CODE ANN. § 1703.28 (Page 1978) (statutory forfeiture of \$250-\$10,000); *Id.* § 1703.29 (inability to use Ohio courts to maintain an action until license obtained); *Id.* § 1703.30 & 1703.99 (officers of corporation transacting business without license guilty of a fourth degree misdemeanor). Under the Proposed Act, these provisions would be inapplicable to a professional corporation transacting business in Ohio without maintaining an office in the state.

<sup>157</sup> Dunkel, *supra* note 13, at 708.

<sup>158</sup> Vesely, *supra* note 12, at 212.

<sup>159</sup> Smith, *supra* note 22, at 440.

<sup>160</sup> *Id.* at 457.

<sup>161</sup> Hopkins, *supra* note 44, at 144.

<sup>162</sup> See *supra* note 2, and accompanying text.

<sup>163</sup> Hopkins, *supra* note 44, at 146.

law, such as the problems engendered by transfer of shares to an unqualified shareholder, and should be adopted. Even a selective approach by the Ohio General Assembly to the Proposed Act would be preferable to continued legislative inattention.